SUPREME COURT, U. S.

No. 75-653

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

GERALD R. WEEKS, individually and as Chairman of the DuPage County Board of Commissioners, ROBERT A. MORRIS, individually and as Chairman of the Special Investigative Committee, and FRANK H. BELLINGER, individually and as Vice-Chairman of the Special Investigative Committee,

Petitioners,

vs.

JAMES CLARK, Treasurer of DuPage County, and MICHAEL DUTTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Warren E. Burger, Chief Justice, and the Associate Justices of the Supreme Court:

Petitioners, Weeks, Morris and Bellinger, respectfully petition for a writ of certiorari to review an order of the United States Court of Appeals for the Seventh Circuit dismissing Petitioners' appeal below.

OPINIONS BELOW

The United States District Court for the Northern District of Illinois rendered no opinion below. The District Court's Minute Order which was appealed from is reprinted as Appendix A to this Petition. The opinion of the Seventh Circuit Court of Appeals dismissing Petitioners' appeal is not officially reported but its Slip Opinion is reprinted as Appendix B to this Petition.

JURISDICTION

The decision of the Court of Appeals which constitutes its judgment was entered on August 5, 1975. Jurisdiction of this Court to review the judgment by writ of *certiorari* is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a Temporary Restraining Order in a case required to be heard by a three-judge court pursuant to 28 U.S.C. §2281 may be extended over opposition beyond twenty days without a hearing on a motion for a preliminary injunction and whether such a procedure is sanctioned by Rule 65(e) of the Federal Rules of Civil Procedure.

(2) Whether an indefinitely extended Temporary Restraining Order becomes an appealable interlocutory injunction within the terms of 28 U.S.C. §1292(a)(1) even though a three-judge court has been convened pursuant to 28 U.S.C. §2284(1).

(3) Whether 28 U.S.C. §§2281 or 2284 confers general appellate jurisdiction on three-judge district courts.

(4) Whether the Court of Appeals erred in dismissing the Petitioners' appeal.

STATUTES INVOLVED

Title 28 U.S.C. §2284(3) provides in relevant part:

> "In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court."

Rule 65(b) of the Federal Rules of Civil Procedure, as amended, Effective July 1, 1966, provides in relevant part:

> "A temporary restraining order . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

Rule 65(e) of the Federal Rules of Civil Procedure provides in relevant part:

> "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; . . . or Title 28, U.S.C. §2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges."

Title 28 U.S.C. §1450 provides in relevant part:

> "Whenever any action is removed from a State court to a district court of the United States . . .
>
> * * *

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

STATEMENT OF THE CASE

Respondents (plaintiffs below) filed a lawsuit on June 19, 1975, in the United States District Court for the Northern District of Illinois, pursuant to Title 42 U.S.C. §1983, to redress alleged deprivations of their rights under the First, Fourth and Fourteenth Amendments of the Constitution of the United States.

Respondents sought and obtained a Temporary Restraining Order of June 23, 1975, preventing your Petitioners from proceeding with an investigation of James H. Clark relating to the propriety of his conduct as Treasurer of DuPage County by a special committee comprised of 13 members of the County Board of DuPage County, Illinois. Petitioners are elected members of the DuPage County Board.

On July 1, 1975, over opposition of Petitioners, who filed a motion to dissolve the Temporary Restraining Order, the single district court judge extended the Temporary Restraining Order indefinitely. (Appendix A) To date, Petitioners have had no hearing on the Respondents' motion for a preliminary injunction. On July 14, 1975, Petitioners filed a Notice of Appeal in the Seventh Circuit Court of Appeals. On August 5, 1975, acting on the motion of Respondents, the Seventh Circuit Court of Appeals dismissed the appeal for lack of jurisdiction. The court below held it was without jurisdiction to hear Petitioners' appeal in view of the provisions of 28 U.S.C.

§2284(3) and §2284(5), citing *Hicks* v. *Pleasure House, Inc.*, 404 U.S. 1 (1971):

> ". . . a temporary restraining order issued pursuant to §2284(3) is reviewable in a court of appeals to the extent that any such order is reviewable under 28 U.S.C. §§1291 and 1292(a). However, if no such appeal is taken before the three-judge court is convened, application must be made to that court for vacation or modification of the temporary restraining order pending a final determination of the merits." 404 U.S. at 3

REASONS FOR GRANTING THE WRIT

The Petition raises a fundamental question concerning the limited and fixed duration of Temporary Restraining Orders. Rule 65(b) of the Federal Rules of Civil Procedure is explicit. Petitioners have had no evidentiary hearing on a motion for preliminary injunction and have been indefinitely enjoined. In normal circumstances, the law is clear that the Temporary Restraining Order presently entered is of no effect. *Granny Goose Foods, Inc.* v. *Teamsters,* 415 U.S. 423, 451 (1974); *Pan American World Airways* v. *Flight Engineers Ass'n.,* 306 F.2d 840 (2d Cir. 1962); *Sims* v. *Greene,* 160 F.2d 512 (3rd Cir. 1947).

Thus, the court must determine whether a Temporary Restraining Order granted in a three-judge court case has a special indefinite life which Temporary Restraining Orders in other cases do not.

In *Granny Goose Foods, Inc.* v. *Teamsters, supra,* this court granted *certiorari* to the Ninth Circuit Court of Appeals in a case involving an interpretation of 28 U.S.C. §1450. The case in the Ninth Circuit turned on the narrow issue of whether a Temporary Restraining Order could be extended indefinitely without a hearing held on a motion for a preliminary injunction. The Ninth Circuit held that it could not and this Court, noting a conflict in the circuits,[1] granted *certiorari* and affirmed the Ninth Circuit.

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[1] *Appalachian Volunteers, Inc.* v. *Clark,* 432 F.2d 530 (6th Cir. 1970), *cert. denied* 401 U.S. 939 (1971); *Morning Telegraph* v. *Powers,* 450 F.2d 97 (2d Cir. 1971), *cert. denied* 405 U.S. 954 (1972).

The *Granny Goose* case involved employer-employee relationships and, read literally, Rule 65(e) of the Federal Rules of Civil Procedure might well proscribe any application of Rule 65(b) with respect to the duration of a Temporary Restraining Order in such a case. This Court, while not considering the applicability of the provisions of Rule 65(e), rejected the notion that a special breed of Temporary Restraining Orders was created by the provisions of 28 U.S.C. §1450 and accordingly should grant *certiorari* here to determine the important question of whether a special breed of Temporary Restraining Order of indefinite duration is created by virtue of 28 U.S.C. §2284(3).

In *Granny Goose*, this Court was faced with the precise circumstances which are present in the instant case. In resolving the facial conflict between the provisions of 28 U.S.C. §1450 and Rule 65(b), the Court succinctly stated the issue and held:

> "To the extent this reading of §1450 is inconsistent with the time limitations of Rule 65(b), petitioners contend the statute must control.
>
> In our view, however, §1450 can and should be interpreted in a manner which fully serves its underlying purposes, yet at the same time places it in harmony with the important congressional policies reflected in the time limitations in Rule 65(b)." 415 U.S. at 435.

The Court should grant this petition for *certiorari* to place Title 28 U.S.C. §2284(3) in harmony "with the

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[2] Basically involved, as this court noted, was a dispute over the enforceability against the defendant union of certain changes in new contracts. 415 U.S. at 427. The Temporary Restraining Order was obtained *ex parte* and the union's motion to dissolve the Temporary Restraining Order was denied.

important congressional policies reflected in the time limitations in Rule 65(b)."

The Seventh Circuit Court of Appeals held that it was without jurisdiction to hear Petitioners' appeal since if the Temporary Restraining Order were appealable at all it must be heard by the three-judge court. A three-judge court is a *nisi prius* tribunal and does not have general appellate jurisdiction. *Preston County Light & Power Co.* v. *Public Service Comm'n of West Virginia*, 297 F.Supp. 759, 864 (S.D.W.Va. 1969; *Jacobs* v. *Tawes*, 250 F.2d 611, 614 (4th Cir. 1957); see also *Majuri* v. *United States*, 431 F.2d 469 (3rd Cir. 1970), *cert. denied* 400 U.S. 943 (1970); *West Virginia Motor Truck Ass'n* v. *Public Service Comm'n*, 123 F.Supp. 206, 216 (S.D.W.Va. 1954), *aff'd* 348 U.S. 881 (1954). Normally, of course, Temporary Restraining Orders are not appealable. *Pan American*, *supra*, at 841-842. It is only when a Temporary Restraining Order becomes an interlocutory injunction that it is subject to review pursuant to 28 U.S.C. §1292(a)(1). *Pan American* at 842; *Sims* v. *Greene*, *supra*, at 517. Petitioners filed a timely notice of appeal on July 14, 1975, exactly one day after a "normal" Temporary Restraining Order would have expired. If in three-judge cases the Federal Rules of Appellate Procedure for filing a notice of appeal are amended so that a party against whom a Temporary Restraining Order is obtained must file his notice of appeal before the chief judge of the circuit court convenes the three-judge court, this Court should seize an opportunity to make this anomaly clear to the practicing bar. It is Petitioners' view that the Temporary Restraining Order entered June 23, 1975 did not become an interlocutory injunction and thus appealable within 28 U.S.C. §1292(a)(1) until the expiration of twenty days from the date it was originally granted, June 23, 1975.

CONCLUSION

All questions now presented for review were answered incorrectly by the lower courts in that the holdings below conflict with applicable decisions of this court and the mandate of the Federal Rules of Civil Procedure relating to the duration of Temporary Restraining Orders.

It is requested, therefore, that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

County of Cook }
State of Illinois } ss.

I, Terry M. Grimm, state under oath that I have this date served the attached Petition for Writ of Certiorari on James Clark and on Michael Dutton by delivering three copies of the same by hand to their counsel of record, Thomas P. Sullivan, Alan L. Metz and Jeffrey D. Colman, Jenner & Block, One IBM Plaza, Chicago, Illinois, and by mailing one copy of the same by certified mail to their additional counsel of record, Paul T. Kalinich, 646 Roosevelt, Glen Ellyn, Illinois. All parties required to be served have thus been served.

.....
Terry M. Grimm

Subscribed and sworn to
before me this third day
of November, 1975.

.....
Notary Public